

Chapter 7

Options to Protect the Security of Water Rights

This chapter identifies options to protect the security of water rights, the first of the three specific tasks set out for the management plan in HB 397. To understand why water right security is important, we must first understand the utility of a water right and what would constitute security. Before identifying the options, the existing means for providing protection are discussed.

What Do Secure Water Rights Protect?

As explained in Chapter 4, a water right conveys not the ownership of water but the right to put water to a beneficial use. Thus, secure water rights ensure the ability to use water when it is legally and physically available. Legal availability refers to the “first in time, first in right” rule. Because water is a limited resource, water rights determine how it is to be allocated among competing users. A secure water right also protects the economic interest that is dependent on the use of water.

What Is Meant by Security of Water Rights?

In the context of water rights, security means that the allocation rules are not changing and that their application is both predictable and certain. Security also means that enforcement of water rights is timely and affordable, and that new uses of water should not impact existing uses.

What is Presently Being Done to Protect the Security of Water Rights?

The security of water rights is protected through legal and planning processes.

Legal Processes

Since 1979, the Montana Water Court has been conducting a state-wide water rights adjudication to quantify all pre-1973 water rights and clarify their priority dates. It is important to note that quantifying the pre-1973 rights is not the same as determining the legal or physical availability of water. Water rights are based on the amount of water historically put to a beneficial purpose.¹ As a part of this process, the Compact Commission has been negotiating compacts with agencies of the federal government and tribal governments to quantify reserved federal water rights. In the Clark Fork River basin, the Compact Commission is negotiating compacts with the Confederated Salish and Kootenai Tribes and the U.S. Forest Service.

Beginning in 1973, new water rights are secured through the water rights permitting and change processes that require a determination of no adverse impact on existing water rights. These processes are administered by DNRC pursuant to the Montana Water Use Act. Water rights holders on streams that have an enforceable decree issued by state or federal courts or through the state-wide adjudication can enforce their rights by hiring a water commissioner to implement the decree. Some basins have been closed to the issuances of new surface water rights either through administrative rule, legislative action, or a negotiated compact. Basin closures protect existing water right holders by prohibiting new junior water uses, thereby eliminating the need to spend time and money objecting to proposed new permit applications on streams that are already over appropriated. Individual water rights holders

¹ Merely summing the water rights in a basin does not accurately determine how much water is used in any given year. Determining whether water is legally available for additional appropriation requires examining the basin hydrology, specifically historic flow patterns, and comparing them to existing water rights.

can also seek to protect their rights through litigation in Montana courts. In the case of water right permits issued by DNRC after 1973, an individual can seek enforcement by DNRC. As discussed in Chapter 4, DNRC will first seek voluntary compliance, but can then request that the court impose a fine for each day that a water rights permit violation exists. Due to fiscal and staffing constraints, DNRC is not taking complaints to court.

Planning Processes

Water rights holders and other interests in the Clark Fork River basin are working together in collaborative watershed planning groups and through other organizations such as associations, irrigation districts, and conservation districts. These groups engage in activities such as water data collection, maintenance and construction of water storage and conveyance facilities, drought planning, water quality improvement and riparian area restoration projects, dispute resolution, and water education. A list of existing basin watershed planning groups is included in the following table.

Table 7-1 Clark Fork River Basin Watershed Groups

Group	Geographic Area of Interest
Bitter Root Water Forum	Bitterroot River Watershed in Ravalli County
Blackfoot Challenge	Blackfoot River Watershed
Tri-State Water Quality Council	Clark Fork and Pend Oreille river basins
Flathead Basin Commission	Flathead River Watershed
Nine Mile Watershed Group	Nine Mile Creek Watershed
Swan Ecosystem Center	Swan River Ecosystem
Upper Clark Fork River Basin Steering Cmte	Clark Fork River Watershed above Milltown Dam
Lower Clark Fork Watershed Councils	Elk, Prospect, Rock, Whitepine, Trout, and Pilgrim creeks and Bull River watersheds

Options to Protect the Security of Water Rights

The Task Force identified several options to protect the security of water rights. These options address the water rights adjudication, tribal water rights in the basin, and the burden of water rights enforcement.

Water Rights Adjudication

Complete the Adjudication - The most important option is to complete the adjudication of water rights in the basin. Until the adjudication is completed, no water right will be secure. Allocation of water within the basin cannot be enforced until the quantity and priority of all basin water rights is determined. Given the lack of any completion goals and the inadequate staffing and funding resources now provided to two agencies carrying out it out, DNRC estimates that at least another 20 years will be required to finish evaluating claims. Additional years will be needed for the Water Court to issue final decrees. The 1979 legislation setting the adjudication in motion was accompanied by a fiscal note indicating that 100 full-time equivalents (FTE's) would be required to complete the work in 10 years. However, the Montana Water Court now has only six water masters and three administrative support positions in addition to the chief water judge. DNRC has only 9.8 FTEs assigned to assisting the Water Court deliberations. Completing the adjudication could be facilitated by the following actions.

- Establish a reasonable goal, such as 5 years, for achieving enforceable water rights decrees in the Clark Fork basin.
- Provide additional resources for the adjudication process, including:
 - Provide additional funding for the Water Court and DNRC; and
 - Re-prioritize DNRC's existing resources to focus on the adjudication.

Improve the Accuracy of the Water Rights Adjudication - Under the existing adjudication process, final decrees may not resolve inaccurate water rights claims. Accuracy is important for two reasons. First, inaccurate decrees may deny individual water rights holders the water to which they are legally entitled. Second, the federal statute that subjects federal water rights, including federal reserved rights, to state adjudication processes, requires that the adjudication be “sufficiently accurate.” Presently, the Water Court examines the accuracy of water rights claims only if individual rights holders file objections to them in the court process. If no one objects, claims would likely be included in final decrees, including those with DNRC issue remarks (problems identified during the DRNC claims examination). Although it has ruled that it has the authority to examine claims itself, the Water Court is not doing so. This problem could be alleviated in one of two ways. First, the court could formally announce that it will examine claims with DNRC issue remarks to which no objections have been filed and resolve those it finds to be inaccurate. Experience in other state adjudications indicates that the certainty that the court will examine such claims motivates claimants to work with the agency to resolve issue remarks. This then eliminates the need for subsequent court action. Second, an institutional objector such as DNRC or the Montana Attorney General could be empowered and funded to examine claims and to object to those found to be inaccurate. Adequate funding would be necessary because of the number and complexity of the claims which must be examined. Given the time and money which has been and continues to be devoted to the adjudication, all reasonable efforts should be made to ensure that the adjudication results in durable and accurate water rights.

Tribal Water Rights

The adjudication cannot be completed until the status of the Salish and Kootenai Tribal water rights is definitively resolved. The state and the Confederated Salish and Kootenai Tribes should move as rapidly as possible to resolve the status through negotiation or litigation.

Water Rights Enforcement Burden

Water rights holders presently bear the burden of protecting their rights in three other areas in addition to ensuring the accuracy of the adjudication: day-to-day water administration, illegal or unauthorized water use, and post-1973 water allocation actions. The expense and time required in each of these areas can limit the ability of individuals to protect their water rights. These burdens could be relieved through the following actions.

Day-To-Day Water Administration - DNRC rarely exercises its existing enforcement authority on behalf of individual water rights holders. This is due to a combination of factors, including the lack of resources, the requirement that it obtain a court order to do so, and an apparent lack of willingness on the agency's part. The Montana Legislature could provide direction to DNRC and earmark an appropriation to support investigation and enforcement of water rights. Enforcement could also be facilitated through the use of court-appointed or DNRC mediators. The Legislature could direct DNRC to provide these mediation services. Finally, as mentioned in Chapter 4, water right holders in those basins with water rights decrees can petition district court to appoint a water commissioner. Those ultimately receiving water now split the costs of the commissioner on a *pro rata* share basis according to the amount of water they receive. Commissioners now work part time for relatively low wages and do not receive benefits. The position of water commissioner could be upgraded by requiring DNRC to administer a program that trains, selects, and evaluates water commissioners. The cost of the commissioners could also be shared by all rights holders according to their share of the total basin water rights rather than just those receiving water.

Illegal Or Unauthorized Water Use - In the absence of enforcement activity by DNRC, individual water rights holders must bring an action in district court to halt an illegal or unauthorized use of

water. While courts have the authority to award attorney fees to individuals, the legislature could explicitly direct a judge to award attorney fees to a private party bringing a successful action for an illegal use of water when diversions are made without a water use permit or existing water right.

Post-1973 Water Allocation Actions - Pursuant to a statute passed by the 2003 Legislature, DNRC is developing administrative rules to establish criteria for objecting to water rights permit and change applications that increase the burden on applicants while reducing the burden on existing rights holders. DNRC could complete these rules in an expeditious manner.